UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and BENNETT T. MARTIN,	)	
	)	FILED: April 30, 2001
Defendants.	)	

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SEPARATE HEARING TO DETERMINE EXISTENCE OF CONSPIRACY FOR INVOCATION OF RULE 801(D)(2)(E)

I
INTRODUCTION

Defendants have filed a *Motion For Separate Hearing to Determine Existence of Conspiracy for Invocation of Rule 801(d)(2)(E)* ("Motion"). In short, the defendants request that this Court conduct a James hearing pre-trial to determine the admissibility of co-conspirator statements that the government may seek to introduce. More, the defendants completely ignore Bourjaily v. United States, 483 U.S. 171 (1987), and ask this Court to not consider the co-conspirator statements sought to be introduced in making its determination as to whether a conspiracy existed, whether the declarant and defendant were co-conspirators, and whether the statements were made in furtherance of the conspiracy. Because the defendant's Motion is purely an effort to preview the government's case, is not required by law, and would prolong and complicate the pre-trial proceedings, it should be denied.

Accordingly, the United States requests that it be allowed to follow the usual practice of structuring the presentation of its case-in-chief to allow the Court to make a preliminary factual determination pursuant to Fed. R. Evid. 104(a) as soon as practicable, and that the co-conspirator statements governed under Fed. R. Evid. 801(d)(2)(E) be conditionally admitted subject to being "connected up" during the trial. Moreover, under Bourjaily and Rule 801(d)(2), this Court must consider the co-conspirator statements themselves in determining whether the charged conspiracy existed, whether the declarant and defendants were members of the charged conspiracy, and whether the statements were made in furtherance of the charged conspiracy.

II
LEGAL AUTHORITY

A. THE FIFTH CIRCUIT DOES NOT REQUIRE A PRE-TRIAL HEARING

Co-conspirator statements are properly admitted under Fed. R. Evid. 801(d)(2)(E) if the trial court makes the determination that the government has established, by a preponderance of the evidence, the following: (1) a conspiracy existed; (2) the declarant and the defendant were members of the conspiracy; and (3) the statements were made in the course of and in furtherance of the conspiracy. Bourjaily, 483 U.S. at 175-76. See United States v. James, 590 F.2d 575, 590 (5th Cir. 1979) (en banc), cert. denied, 442 U.S. 917 (1979). A district court's ruling will be reversed only if its findings are clearly erroneous. United States v. Chase, 838 F.2d 743, 749 (5th Cir. 1988), cert. denied, 486 U.S. 1035 (1988).

The Fifth Circuit does not require a court to conduct a pre-trial evidentiary hearing to decide the admissibility of co-conspirator statements. The Fifth Circuit has held that, if it is not reasonably practicable to require the government to show that a co-conspirator's statements are

admissible under Rule 801(d)(2)(E) before admitting the evidence, then the district court may conditionally admit the co-conspirator's out-of-court statements subject to being connected up during the trial. James, 590 F.2d at 582. Indeed, in James, the Fifth Circuit posited that the trial court's threshold determination of admissibility is normally to be made during the presentation of the government's case in chief. Id. at 581.

Further, Fifth Circuit decisions since James have made it clear that a pre-trial hearing of the type requested by the defendants here is not required. See, e.g., United States v. Fragoso, 978 F.2d 896, 899 (5th Cir. 1992), cert. denied, 507 U.S. 1012 (1993). Since James, the Fifth Circuit has routinely upheld approaches to determining admissibility of statements under Rule 801(d)(2)(E) that are less onerous than a pre-trial hearing. For example, in United States v. Gonzalez-Balderas, 11 F.3d 1218, 1224 (5th Cir. 1994), cert. denied, 511 U.S. 1129 (1994), the Fifth Circuit held that for practical purposes, the district court could conditionally admit the co-conspirator statements at trial subject to a subsequent determination as to whether the government satisfied the requisite predicate under Rule 801(d)(2)(E). As long as the court finds the predicate facts by a preponderance of the evidence at the end of trial, the court will not err in admitting co-conspirator statements. United States v. Whitley, 670 F.2d 617, 620 (5th Cir. 1982). A hearing out of the presence of the jury is not required. Id. Likewise, in Fragoso, the Fifth Circuit approved deferral of a James ruling until the close of the government's case. Fragoso, 978 F.2d at 899-900.

Deferring a James ruling until the close of the government's case is particularly appropriate in cases in which holding a pre-trial hearing would, in effect, result in trying the case twice and wasting valuable judicial resources and time. See Gonzalez-Balderas, 11 F.3d. at 1223. See also

United States v. Ruiz, 987 F.2d 243, 246 (5th Cir. 1993), cert. denied, 510 U.S. 855 (1993) (district court did not abuse discretion in failing to conduct pre-trial hearing to determine admissibility of co-conspirator statements); United States v. Acosta, 763 F.2d 671, 679 (5th Cir. 1985), cert. denied, 474 U.S. 863 (1985) (upholding district court determination that "if we had to have a separate independent hearing insofar as the conspiracy is concerned, we in effect would be trying this lawsuit two times"); United States v. Whitley, 670 F.2d 617, 620 (5th Cir. 1982) (trial court did not err in admitting statements of co-conspirator prior to determining facts of drug conspiracy because separate hearing outside of jury's presence is not always feasible). If the district court declines to hold a pre-trial hearing then, at the close of the government's case and on appropriate motion, it must determine whether the government has established the predicate facts for admissibility under Rule 801(d)(2)(E) by a preponderance of the evidence and make factual findings on the record to that effect before submitting the statements to the jury. See James, 590 F.2d at 582-83.

Thus, in the Fifth Circuit, a pre-trial hearing is not required by law, but rather the trial court may admit co-conspirator statements subject to the later establishment of an adequate foundation.

B. THIS COURT MUST CONSIDER THE CO-CONSPIRATOR STATEMENTS THEMSELVES IN DETERMINING THEIR ADMISSIBILITY

Fed. R. Evid. 104(a) provides: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the Court. . . ." Fed. R. Evid. 104(a) also provides: "In making its determination [the court] is not bound by the rules of evidence except those with respect to privileges." In Bourjaily, the Supreme Court rejected the argument that the court should look only at evidence other than the co-conspirator statements. Bourjaily, 483 U.S. at 176-181. The

Court held that a court may consider the out-of-court statements of co-conspirators in making its determination as to the admissibility of such statements under Fed. R. Evid. 801(d)(2)(E). Id. at 178. Indeed, in Bourjaily the Supreme Court made it clear that the trial court may consider any evidence whatsoever, bound only by the rule of privilege. Id. The Bourjaily Court stated: "We think that there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy." Id. at 180. Rule 801(d)(2) was amended in 1997 in response to Bourjaily, and now requires the court to consider the co-conspirator statements in determining whether the conspiracy existed and whether the defendants and declarant were members of the conspiracy.

III
ARGUMENT

Here, like in the cases cited above, a pre-trial evidentiary hearing is unnecessary. A full-blown evidentiary hearing to establish separately the foundation for each statement that the government may seek to introduce under Fed. R. Evid. 801(d)(2)(E) will not only be extensive, but is tantamount to requiring the government to put on its entire case. The charged conspiracy covered a period lasting more than five years, involved a comprehensive market allocation agreement, and involved numerous participants. In this case, as in most antitrust cases where the agreement itself is the crime, the co-conspirator statements are the most probative evidence of the existence of a conspiracy and the participation in the conspiracy of the declarant and defendant. Moreover, there can be no question that the out-of-court statements of Bennett T. Martin (as well as other Martin News employees who acted in furtherance of the conspiracy as agents of the defendant company) are admissible not only as co-conspirator statements but also as party

admissions under Fed. R. Evid. 801(d)(2)(A).

The defendants would love to have a full-blown evidentiary hearing to smoke out the government's case and preview the government's evidence. But they are not entitled to one. Here, such a pre-trial hearing would serve no purpose other than to unnecessarily burden the government by requiring it to duplicate its efforts, waste scarce judicial resources, and burden government witnesses, who, like the government, will have to duplicate their efforts.

In addition, at trial, as provided in Rule 801(d)(2) and Bourjaily, this Court must consider the co-conspirator statements themselves in determining the admissibility of the statements under Fed. R. Evid. 801(d)(2)(E). The defendants' request that this Court determine the admissibility of co-conspirator statements based solely on independent evidence and without considering the co-conspirator statements themselves flies in the face of Bourjaily.

IV
CONCLUSION

The evidentiary hearing requested by the defendants is an effort to preview the government's case, is not required by law, and would prolong and complicate the pre-trial proceedings. Consequently, their Motion should be denied. Further, based on the foregoing reasons, the United States requests that it be allowed to structure the presentation of its

case-in-chief to allow the Court to make a preliminary factual determination pursuant to Fed. R. Evid. 104(a) as soon as practicable, and to conditionally admit co-conspirator statements as defined by Fed. R. Evid. 801(d)(2)(E) subject to the establishment of an adequate foundation for admissibility.

Respectfully Submitted,

"/s/"

SCOTT M. WATSON
Chief, Cleveland Field Office

RICHARD T. HAMILTON, JR.
Ohio Bar Number--0042399

MICHAEL F. WOOD
District of Columbia Bar Number--376312

KIMBERLY A. SMITH
Ohio Bar Number--0069513

SARAH L. WAGNER
Texas Bar Number--24013700

Attorneys, Antitrust Division
U.S. Department of Justice
Plaza 9 Building, Suite 700
55 Erieview Plaza
Cleveland, OH 44114-1816
Telephone: (216) 522-4107
Fax: (216) 522-8332

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April, 2001.

Richard Alan Anderson, Esq.
Burleson, Pate & Gibson, L.L.P.
2414 N. Akard, Suite 700
Dallas, TX 75201

Michael P. Gibson
Burleson, Pate & Gibson, L.L.P.
2414 N. Akard, Suite 700
Dallas, TX 75201

"/s/"
RICHARD T. HAMILTON, JR